



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 23, 2004

Ms. Amy L. Sims  
Assistant City Attorney  
City of Lubbock  
P.O. Box 2000  
Lubbock, Texas 79457

OR2004-9975

Dear Ms. Sims:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 213447.

The City of Lubbock's Director of Aviation (the "city") received a request for nine categories of information relating to the Lubbock International Airport for a specified time interval. You claim that some of the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.182 of the Government Code.<sup>1</sup> You also contend that federal law governs the release of the information in question, so that the information is excepted from disclosure under section 552.101 in conjunction with federal law. We have considered your arguments and have reviewed the information you submitted. We assume that the city has released any other responsive information that was in existence when the city received this request. If not, then the city must release any such information at this time.<sup>2</sup> We note that the Act does not require the

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<sup>1</sup>Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is made confidential by other statutes. Sections 418.176 through 418.182 of the Government Code make certain types of information relating to terrorism confidential.

<sup>2</sup>See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

city to release information that did not exist when it received this request or to create responsive information.<sup>3</sup>

As federal law preempts state law to the extent that state law actually conflicts with federal law, we will consider your federal law arguments first.<sup>4</sup> Effective November 19, 2001, Congress enacted the Aviation and Transportation Security Act ("ATSA"), which created the United States Transportation Security Administration ("TSA"), a new agency within the United States Department of Transportation ("DOT") headed by the Under Secretary of Transportation for Security (the "Under Secretary"). See 49 U.S.C. § 114(a), (b)(1). The ATSA provides that, by November 19, 2002, the responsibility for inspecting persons and property carried by aircraft operators and foreign air carriers will be transferred from the Federal Aviation Administration (the "FAA") Administrator to the Under Secretary as head of the TSA. These responsibilities include carrying out the requirements of chapter 449 of title 49 of the United States Code, which pertain to civil aviation security. See *id.* § 114(d)(1). On November 25, 2002, the President signed into law the Homeland Security Act of 2002 (HSA), which transferred TSA to the newly established Department of Homeland Security ("DHS"). In connection with that transfer, the HSA transferred TSA's authority concerning sensitive security information ("SSI") under section 40119 of title 49 of the United States Code to section 114(s) of title 49 of the United States Code and amended section 40119 to vest similar SSI authority in the Secretary of DOT. Section 114(s) of title 49 now states:

Notwithstanding [the Federal Freedom of Information Act (the "FOIA")], the Under Secretary shall prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act . . . if the Under Secretary decides disclosing the information would –

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or financial information; or

(C) be detrimental to the security of transportation.

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<sup>3</sup>See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>4</sup>See *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990); see also *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

*Id.* § 114(s). This provision requires the TSA's Under Secretary to "prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act." *Id.* It authorizes the Under Secretary to prescribe regulations that prohibit disclosure of information requested not only under the FOIA, but also under other disclosure statutes. *Cf. Public Citizen, Inc. v. Federal Aviation Admin.*, 988 F.2d 186, 194 (D.C. Cir. 1993) (former section 40119 authorized FAA Administrator to prescribe regulations prohibiting disclosure of information under other statutes as well as under the FOIA). Thus, the Under Secretary is authorized by section 114(s) to prescribe regulations that prohibit disclosure of information requested under the Texas Public Information Act (the "Act"), chapter 552 of the Government Code.

Pursuant to the mandate and authority of section 114(s) of title 49, TSA published new interim final regulations pertaining to civil aviation security, which are found in title 49 of the Code of Federal Regulations and which took effect June 17, 2004. *See* 69 Fed. Reg. 28066. Section 1520.1(a) of these regulations provides that the regulations govern the disclosure of records and information that TSA has determined to be SSI as defined in section 1520.5 of title 49 of the Code of Federal Regulations. *See* 49 C.F.R. § 1520.1(a). Section 1520.5 defines SSI to include information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would be detrimental to the security of transportation. *See id.* § 1520.5(a)(3). Further, section 1520.5 lists sixteen categories of information that constitute SSI, including security inspection or investigative information and specific details of aviation or maritime transportation security measures, both operational and technical, whether applied by the federal government or another person. *See id.* § 1520.5(b)(6), (8). Section 1520.9 provides that those covered by the regulation, which include among others airport and aircraft operators, their employees, contractors, and agents, *see id.* § 1520.7(a), "must take reasonable steps to safeguard SSI . . . from unauthorized disclosure[]" and must "refer requests by other persons for SSI to TSA or the applicable component or agency within DOT or DHS." *Id.* § 1520.9(a) (emphasis added).

Based on the above-described statutory and regulatory scheme, we find that the decision to release or withhold the submitted information is not for this office or the city to make, but rather is a decision for the Under Secretary as head of the TSA. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (noting that state law is preempted to extent it actually conflicts with federal law); *see also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (noting that federal agency acting within scope of its congressionally delegated authority may preempt state regulation). We therefore conclude the city may not release the submitted information at this time under the Act and instead must refer this request for information to the TSA for its decision concerning disclosure of the information at issue.<sup>5</sup>

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<sup>5</sup>As we are able to make this determination, we need not address your claim under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.182.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

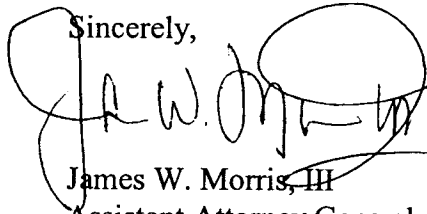
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 213447

Enc: Submitted documents

c: Mr. Blaine Petersen  
Clausen Miller, P.C.  
10 South LaSalle Street  
Chicago, Illinois 60603-1098  
(w/o enclosures)